THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 2401-0211-10
RICKY WILLIAMS,	)	
Employee	)	
	)	Date of Issuance: June 22, 2012
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge

Lee W. Jackson, Esq., Employee Representative
Sara White, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2009, Ricky Williams ("Employee") filed a petition for appeal with the Office of Employee Appeals ("the OEA" or "the Office") contesting the District of Columbia Public Schools' ("Agency" or "DCPS") action of terminating his employment through a Reduction-in-Force ("RIF"). The effective date of the RIF was November 2, 2009. Employee's position of record at the time his position was abolished was a ET-15 Special Education Teacher at Eaton Elementary School. Employee was serving in Educational Service status at the time he was terminated.

I was assigned this matter on February 6, 2012. On February 16, 2012, I ordered the parties to submit briefs on the issue of whether Agency conducted the instant RIF in accordance with applicable District laws, statues, and regulations. Employee's request for an extension to file his brief was granted. Both parties submitted timely responses to the order. After reviewing the documents of record, I find that there are no material issues of fact in dispute. Therefore, I further find that an evidentiary hearing is unwarranted in this matter. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.03 (2001).

ISSUE

Whether Agency's action of separating Employee from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

On September 10, 2009, former D.C. Public Schools Chancellor Michelle Rhee authorized a Reduction-in-Force ("RIF") pursuant to D.C. Code § 1-624.02, 5 DCMR Chapter 15, and Mayor's Order 2007-186. Chancellor Rhee stated that the RIF was necessitated for budgetary reasons, explaining that the 2010 DCPS fiscal year budget was not sufficient to support the current number of positions in the schools.[1]

Although the instant RIF was authorized pursuant to D.C. Code § 1-624.02,[2] which encompasses more extensive procedures, for the reasons explained below, I find that D.C. Official Code § 1-624.08 ("Abolishment Act") is the more applicable statute to govern this RIF.

Specifically, section § 1-624.08 states in pertinent part that:

> (a) ***Notwithstanding*** *any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is*

[1] *See Agency's Answer*, Tab 1 (December 31, 2009).

[2] D.C. Code § 1-624.02 states in relevant part that:

> (a) Reduction-in-force procedures shall apply to the Career and Educational Services… and shall include:
> (1) A prescribed order of separation based on tenure of appointment, length of service including creditable federal and military service, District residency, veterans preference, and relative work performance;
> (2) One round of lateral competition limited to positions within the employee's competitive level;
> (3) Priority reemployment consideration for employees separated;
> (4) Consideration of job sharing and reduced hours; and
> (5) Employee appeal rights.

> *in effect* for the fiscal year ending September 30, 2000, and *each subsequent fiscal year*, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).
>
> (b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.
>
> (c) ***Notwithstanding*** *any rights or procedures established by any other provision of this subchapter,* any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).
>
> (d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.
>
> (e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

In *Mezile v. D.C. Department on Disability Services*, the D.C. Superior Court found that "the language of § 1-624.08 is unclear as to whether it replaced § 1-624.02 entirely, or if the government can only use it during times of fiscal emergency."[3] The Court also found that both laws were current and that the government triggers the use of the applicable statute by using "specific language and procedures."[4]

However, the Court of Appeals took a different position. In *Washington Teachers' Union*, the District of Columbia Public Schools ("DCPS") conducted a 2004 RIF "to ensure balanced budgets, rather than deficits in Fiscal Years 2004 and 2005."[5] The Court of Appeals found that the 2004 RIF conducted for budgetary reasons, triggered the Abolishment Act ("the Act") instead of "the regular RIF procedures found in D.C. Code § 1-624.02."[6] The Court stated that the "ordinary and plain meaning of the words used in § 1-624.08(c) appears to leave no doubt about the inapplicability of § 1-624.02 to the 2004 RIF."[7]

The Abolishment Act applies to *positions abolished for fiscal year 2000 and subsequent fiscal years* (emphasis added). The legislation pertaining to the Act was enacted specifically for

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[3] *Mezile v. District of Columbia Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012).
[4] *Id.* at p. 5.
[5] *Washington Teachers' Union, Local # 6 v. District of Columbia Public Schools*, 960 A.2d 1123, 1125 (D.C. 2008).
[6] *Id.*
[7] *Id.*

the purpose of addressing budgetary issues resulting in a RIF.[8] The Act provides that, "notwithstanding any rights or procedures established by any other provision of this subchapter," which indicates that it supersedes any other RIF regulations. The use of the term 'notwithstanding' carries special significance in statutes and is used to "override conflicting provisions of any other section."[9] Further, "it is well established that the use of such a 'notwithstanding clause' clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other sections."[10]

The Abolishment Act was enacted after § 1-624.02, and thus, is a more streamlined statute for use during times of fiscal emergency.[11] Moreover, the persuasive language of § 1-624.08, including the term 'notwithstanding', suggests that this is the more applicable statutory provision to conduct RIFs resulting from budgetary constraints. Accordingly, I am primarily guided by § 1-624.08 for RIFs authorized due to budgetary restrictions. Under this section, an employee whose position was terminated may only contest before this Office:

1. That he did not receive written notice thirty (30) days prior to the effective date of his separation from service; and/or

2. That he was not afforded one round of lateral competition within his competitive level.

Employee's Position[12]

Employee submits that Agency failed to provide him his one round of lateral competition because it placed him in Eaton Elementary School as his competitive area instead of Bunker Hill Elementary School, where he alleges his personnel form placed him. Employee believes that he should have been compared only to special education teachers in Bunker Hill, where presumably he would not have lost his position in a RIF.

Employee also asserts that the scoring of his CLDF was unfair as he had only been teaching at Eaton for a month before he was RIFed, and thus, did not have sufficient time to satisfy the criteria specified in the CLDF. He complains that his military service was not considered in his RIF.

Lastly, Employee gripes about Agency's implementation of the Agency Reemployment Priority Program and the Displaced Employee Program in his case.

Agency's Position

Agency submits that it conducted the RIF in accordance with the District of Columbia Municipal Regulations and the D.C. Official Code by affording Employee one round of lateral competition and thirty (30) days written notice prior to the effective date of his termination.

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[8] *Id*. at 1125.
[9] *Burton v. Office of Employee Appeals*, 30 A.3d 789 (D.C. 2011).
[10] *Id.*
[11] *Mezile v. D.C. Department on Disability Services*, No. 2010 CA 004111 (D.C. Super. Ct. February 2, 2012.)
[12] Employee Brief at p. 9-13 (April 13, 2012).

Agency further maintains that it utilized the proper competitive factors in implementing the RIF and that the lowest ranked ET-15 Special Education Teacher, Employee, was terminated as a result of the round of lateral competition.

Analysis

Under Title 5 DCMR § 1501.1, the Superintendent of DCPS is authorized to establish competitive areas when conducting a RIF so long as those areas are based "upon all or a clearly identifiable segment of the mission, a division or a major subdivision of the Board of Education, including discrete organizational levels such as an individual school or office." For the 2009/2010 academic school year, former DCPS Chancellor Rhee determined that each school would constitute a separate competitive area. In accordance with Title 5, DCMR § 1502.1, competitive levels in which employees subject to the RIF competed were based on the following criterion:

1. The pay plan and pay grade for each employee;

2. The job title for each employee; and

3. In the case of specialty elementary teachers, secondary teachers, middle school teachers and teachers who teach other specialty subjects, the subject taught by the employee.[13]

Here, Eaton Elementary School was identified as a competitive area, and ET-15 Special Education Teacher was determined to be the competitive level in which Employee competed. According to the Retention Register provided by Agency, there were three (3) ET-15 Special Education Teacher positions subject to the RIF. Of these positions, one (1) position was identified to be abolished.

Employee insists that his correct competitive area is Bunker Hill Elementary School instead of Eaton Elementary School because his personnel form allegedly placed him there. However, Employee failed to submit any document to support his position. Indeed, the documents that Employee attached to his brief contradicts his argument as the forms indicated that his placement was indeed in Eaton Elementary School.

Even assuming *arguendo* that Employee's allegation is correct, there is nothing in the statute, regulations, or case law that would hamper Agency's prerogative in placing their teachers in whatever schools there need them. Considering as much, I find Employee's arguments unconvincing.

[13] Agency Brief (March 8, 2012). School-based personnel constituted a separate competitive area from nonschool-based personnel and are precluded from competing with school-based personnel for retention purposes.

Employee was not the only ET-15 Special Education Teacher within his competitive level and therefore, was required to compete with other employees in one round of lateral competition. According to Title 5, DCMR § 1503.2 *et al.*:

> If a decision must be made between employees in the same competitive area and competitive level, the following factors, in support of the purposes, programs, and needs of the organizational unit comprising the competitive area, with respect to each employee, shall be considered in determining which position shall be abolished:
>
> (a) Significant relevant contributions, accomplishments, or performance;
>
> (b) Relevant supplemental professional experiences as demonstrated on the job;
>
> (c) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise; and
>
> (d) Length of service.

Based on § 1503.1, Agency gave the following weights to each of the aforementioned factors when implementing the RIF:

> (a) Office or school needs, including: curriculum, specialized education, degrees, licenses or areas of expertise - (75%)
>
> (b) Significant relevant contributions, accomplishments, or performance – (10%)
>
> (c) Relevant supplemental professional experiences as demonstrated on the job – (10%)
>
> (d) Length of service – (5%)[14]

Competitive Level Documentation Form

Agency employs the use of a Competitive Level Documentation Form ("CLDF") in cases where employees subject to a RIF must compete against each other in lateral competition. In conducting the instant RIF, the principal of Eaton Elementary School was given discretion to assign numerical values to the first three factors enumerated in Title 5, DCMR § 1503.2, *supra*, as deemed appropriate, while the "length of service" category was completed by the Department of Human Resources ("DHR").

[14] It should be noted that OEA has consistently held that DCPS is allowed discretion to accord different weights to the factors enumerated in 1503.2. Thus, Agency is not required to assign equal values to each of the factors. *See White v. DCPS*, OEA Matter No. 2401-0014-10 (December 30, 2001); *Britton v. DCPS*, OEA Matter No. 2401-0179-09 (May 24, 2010).

Employee received a total of five (5) points on his CLDF, and therefore, was ranked the lowest in his respective competitive level. Employee's CLDF stated, in pertinent part, the following:

> "Mr. Williams comes to work on time everyday…However, Mr. Williams has made minimal contribution to the overall school program…Mr. Williams demonstrates limited ability to differentiate as evidenced by how he uses ditto sheets for all students in his class. Mr. Williams demonstrates little or no ability to use technology or creativity during instruction as evidenced by his lack of effective materials and strategies observed…There is no evidence of special education best practices during observations. Mr. Williams' instruction lacked teacher presence, student engagement, and evidence of interest in his part [sic]..."[15]

Office or school needs

This category is weighted at 75% on the CLDF and includes: curriculum, specialized education, degrees, licenses or areas of expertise. Employee received zero (0) points out of a possible ten (10) points in this category; a score much lower than other employee's within his competitive level. Employee claims that he was improperly observed. The undersigned notes that the criteria Agency instructed principals to use in ranking employees did not require a formal observation of employees.[16] Specifically, in the Office or School Needs category, principals were instructed to assign scores "reflecting their best judgment of the extent to which the person meets the particular needs of the school."[17]

The principal of Eaton Elementary School was given the discretion to complete Employee's CLDF. Employee has failed to provide credible evidence that would bolster a score in this area, such as proof of degrees obtained pertinent to his/her work, licenses or other specialized education.

Agency argues that nothing within the DCMR, applicable case law, or D.C. Official Code prevents it from exercising its discretion to weigh the aforementioned factors as it sees fit.[18] Agency cites *to American Federation of Government Employees, AFL-CIO v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), wherein the Office of Personnel Management was given "broad authority to issue regulations governing the release of employees under a RIF…including the authority to reconsider and alter its prior balance of factors to diminish the relative importance of seniority." I agree with this position and find that Agency had the discretion to weigh the factors enumerated in 5 DCMR 1503.2, in a consistent manner throughout the instant RIF.

Significant relevant contributions, accomplishments, or performance

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[15] Agency Brief, Exhibit B (March 8, 2012).
[16] Agency Answer, Tab 2, Attachment B (December 31, 2009).
[17] *Id.*
[18] Agency Brief at pp. 4-5 (March 8, 2012).

This category is weighted at 10% on the CLDF. Per Title 5, DCMR §1503.2, this category requires Employee's "significant relevant contributions, accomplishments, *or* performance (emphasis added). This category evaluates any clear, significant contributions made by employees, above what would normally be expected of an employee in his or her competitive level.

Employee received zero (0) points in this area and contends that he was not given sufficient time at the school for him to make significant contributions or accomplishments. However, he cites no statute, regulation, or case law that mandates Agency to insure that all its employees have had sufficient time in their positions and forbids Agency from implementing a RIF in the face of budget constraints.

The principal was given discretion to complete this area. This Office will not substitute its judgment for the managerial discretion of an agency in handling its personnel matters. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not to OEA.[19] Rather, this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised."[20]

Relevant supplemental professional experiences as demonstrated on the job

This category accounts for 10% of the CLDF. Employee received zero (0) points in this. Employee has not provided any documentation to supplement additional points being awarded in this area. I find that this falls within the rubric of managerial discretion.

Length of service

This category was completed by DHR and was calculated by adding the following: 1) years of experience; 2) military bonuses; 3) D.C. residency points; and 4) rating add—four years of service was given for employees with an "outstanding" or "exceeds expectations" evaluation within the past year. The length of service calculation, in addition to the other factors, were weighted and added together, resulting in a ranking for each competing employee.

Employee complains that his military service was not included. An examination of his CLDF on this section proves him right. However, the CLDF also shows that he already received the maximum five (5) points allowed in this category. Therefore, I find that Agency's error in this instance is harmless and immaterial.

In reviewing the documents of record, Employee does not offer any statutes, case law, or other regulations to refute Agency's position regarding the principal's authority to utilize discretion in completing an employee's CLDF during the course of the instant RIF. In *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the Dist. of Columbia*, 109 F.3d 774 (D.C. Cir. 1997), the D.C. Court of Appeals, in evaluating several union arguments concerning a RIF, stated that "school principals have total discretion to

[19] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994).
[20] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

rank their teachers" and noted that performance evaluations are "subjective and individualized in nature."[21] According to the CLDF, Employee received a total score of 5 after all of the factors outlined above were tallied and scored. The next lowest colleague who survived the instant RIF received a total score of 62. Despite Employee's protestations to the contrary, there is no credible indication that any supplemental evidence would supplant the higher scores received by the remaining colleagues in Employee's competitive level who were not separated from service. Employee has only proffered unsubstantiated allegations and mere conjecture to support his contention that his position should have survived the instant RIF. Employee has not proffered any credible evidence to suggest that a re-evaluation of his CLDF scores would result in a different outcome in this case.[22]

Accordingly, I find that the principal of Eaton Elementary School had discretion in completing Employee's CLDF, as she was in the best position to observe and evaluate the criteria enumerated in DCMR §1503.2, *supra*, when implementing the instant RIF. Moreover, it appears as though Employee's basis for requesting an evidentiary hearing is to be afforded an opportunity to explore and undoubtedly dispute "…interpretations of their worth against [the] principals' evaluations."[23] While it is unfortunate that Agency had to release any employee as a result of budgetary constraints, there is nothing within the record that would lead the Undersigned to believe that the RIF was conducted unfairly. I therefore find that Agency did not abuse its discretion in completing the CLDF, and Employee was properly afforded one round of lateral competition as required by D.C. Official Code § 1-624.08.

Lastly, Employee alleges that Agency improperly implemented the Agency Reemployment Priority Program and the Displaced Employee Program, thereby depriving him of another position. As set forth above, an employee whose position was abolished as a result of a RIF may only contest the following before this Office: 1) that he was not afforded one round of lateral competition within his competitive level; and/or 2) that he was not given 30-days notice prior to the effective date of his separation. Employee's arguments do not fall within either of these areas. In essence, Employee's complaints are grievances. But as of October 21, 1998, this Office no longer has jurisdiction over grievance appeals.[24] Because this Office does not have jurisdiction over the Employee's grievances, I cannot consider the merits of his claims. This does not mean that Employee's objections regarding Agency's post-RIF activity cannot be entertained elsewhere; however, the merits of such claims will not be addressed in this case.

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[21]See also *American Fed'n of Gov't Employees, AFL-CIO v. Office of Pers. Mgmt.*, 821 F.2d 761, 765 (D.C. Cir. 1987) (noting that the federal government has long employed the use of subjective performance evaluations to help make RIF decisions).

[22] See *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (stating that a material fact is one which might affect the outcome of the case under governing law.)

[23] *Washington Teachers' Union* at 780.

[24] Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, restricted the Office's jurisdiction to the following: 1) a performance rating which results in removal of the employee; 2) an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or 3) a RIF. Further, since the passage of OPRAA, this Office has consistently held that grievances are not within our jurisdiction. *See, e.g., Scott v. D.C. Public Schools*, OEA Matter No. J-0005-02 (July 17, 2002); *Anthony v. Department of Corrections*, OEA Matter No. J-0093-99 (June 1, 1999); *Phillips-Gilbert v. Department of Human Services*, OEA Matter No. J-0074-99 (May 24, 1999); *Brown et al. v. Metropolitan Police Department*, OEA Matter Nos. J-0030-99 *et seq.* (February 12, 1999. *See also* OEA Rules sections 604.1 and 604.3 regarding jurisdiction.

Thirty (30) days written Notice

Title 5, §1506 of the DCMR provides the notice requirements that must be given to an employee affected by a RIF. Section 1506.1 states that "an employee selected for separation shall be given specific written notice at least thirty (30) days prior to the effective date of the separation. The notice shall state specifically what action is taken, the effective date of the action, and other necessary information regarding the employee's status and appeal rights." Additionally, the D.C. Official Code § 1-624.08(e) which governs RIFs provides that an Agency *shall* give an employee thirty (30) days notice *after* such employee has been *selected* for separation pursuant to a RIF (Emphasis added).

Here, Employee received his RIF notice on October 2, 2009, and the RIF effective date was November 2, 2009. The notice states that Employee's position is being abolished as a result of a RIF and provides Employee with information about his appeal rights. It is therefore undisputed that Employee was given the required thirty (30) days written notice prior to the effective date of the RIF.

Conclusion

Based on the foregoing, I find that Employee's position was abolished after he properly received one round of lateral competition and a timely thirty (30) day legal notification was properly served. I therefore conclude that Agency's action of abolishing Employee's position was done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in his removal is upheld.

ORDER

It is hereby ORDERED that Agency's action of abolishing Employee's position through a Reduction-In-Force is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge